(3)

98-924

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1998

LESLEY GAY BLACKNER,

Petitioner,

vs.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a passenger use state law to alter a contract of carriage for air transportation and recover damages when the airline acts in accordance with same?

Answer of the Court below:

The New Jersey State Courts answered this question in the negative.

CORPORATE AFFILIATES

The following list identifies all parent companies and nonwholly owned subsidiaries of Continental Airlines, Inc.

1. Continental Aircraft Corp.
2. Continental Airlines Corp.

TABLE OF CONTENTS

QUESTION PRESENTED.....*i*

CORPORATE AFFILIATES.....*ii*

TABLE OF CONTENTS.....*iii*

TABLE OF AUTHORITIES.....*iv*

REASONS FOR DENYING THE PETITION.....1

THE ADA PREEMPTION RULE SET FORTH IN WOLENS CONFINES COURTS, IN BREACH OF CONTRACT ACTIONS, TO THE PARTIES' BARGAIN, WITH NO ENLARGEMENT OR ENHANCEMENT BASED ON STATE LAWS OR POLICIES EXTERNAL TO THE AGREEMENT.

CONCLUSION.....15

APPENDIX

APPENDIX A - Petitioner's Complaint, filed November 14, 1996.....1a

TABLE OF AUTHORITIES

Cases

American Airlines, Inc. v. Wolens,
513 U.S.219 (1995).....*passim*

Continental Airlines, Inc. v. Kiefer,
920 S.W.2d 274 (Tex. 1996).....5,6,7,8,9,10

Morales v. Trans World Airlines, Inc.
504 U.S. 374 (1992).....1,4,5,6,7,8,10,15

Pilot Life Insurance Co. v. Dedeaux,
481 U.S.41 (1987).....10

Statutes

Airline Deregulation Act of 1978.....3,5
49 U.S.C. §1305(a), recodified without substantive
change at 49 U.S.C. §41713(b)(1)

Federal Aviation Act of 1958.....8
49 U.S.C. §40101, et seq. and
49 U.S.C. §40120(c)

REASONS FOR DENYING THE PETITION

THE ADA PREEMPTION RULE SET FORTH IN WOLENS CONFINES COURTS, IN BREACH OF CONTRACT ACTIONS, TO THE PARTIES' BARGAIN, WITH NO ENLARGEMENT OR ENHANCEMENT BASED ON STATE LAWS OR POLICIES EXTERNAL TO THE AGREEMENT.

The Petitioner's request for certiorari is comprised of approximately five pages of substantive argument. The apparent reason for such brevity is that Petitioner cites to only four cases. One of those four cases, American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995), is a decision of this Court which addresses the scope of preemption of contractual claims such as the one at bar. However, the other three cases cited by Petitioner deal only with personal injury claims. Indeed, two of these cases are cited only in a footnote in the Petition. (Pet. 8, Fn.3)

The Petitioner has ignored the underlying basis for the holding of the New Jersey Appellate Court as well as the cases cited therein. Petitioner even ignores a prior decision of this Court which is directly on point, Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992). Moreover,

Petitioner selectively quotes from the Wolens case and by so doing omits portions of that holding which the New Jersey Court recognized as controlling. Even a cursory review of these relevant holdings readily demonstrates that there is no substantive basis to disturb the underlying decision of the New Jersey Court nor to grant the Petition now before this Court.

In considering this Petition, it is important to note that Petitioner does not dispute that Respondent's fee for reissuing a lost ticket is part of its conditions of carriage and incorporated into all of the tickets which it issues. (Pet. 3, Res. App. 2a). Nonetheless, Petitioner's complaint alleges in paragraph 16 that such a fee is "prohibited" by "the contract law of New Jersey". (Res. App. 8a)

Petitioner contends that "New Jersey contract law" can be used to not only void the lost ticket fee imposed by the contract of carriage but to also require the Respondent to pay unspecified damages for including this fee as part of its passenger contract. Such a conclusion is certainly not the opinion of the three New Jersey courts to consider this claim. In this regard, it is relevant to note that Petitioner's

argument was rejected first by the Law Division of the New Jersey Superior Court, then by the Appellate Division of the New Jersey Superior Court and then by the Supreme Court of the State of New Jersey when it refused to disturb the rulings of the two lower courts. (Pet. 1). Despite the fact that three New Jersey Courts recognized that Petitioner's attempt to use New Jersey law to alter an airline passenger's contract is preempted, Petitioner, nonetheless, seeks a review by this Court which would in effect tell the New Jersey courts that they have misinterpreted their own law and wrongfully limited a broader application of same. Petitioner's argument has no substantive merit.

As the underlying New Jersey Courts recognized, Petitioner's attempt to use State law to alter the Respondent's contract of carriage and to penalize the Respondent for acting in accordance with same is clearly preempted by the express preemption provision of the Airline Deregulation Act of 1978 (hereinafter the "ADA") originally codified at 49 U.S.C. App.§ 1305(a) now recodified without substantive change at 49 U.S.C. § 41713(b)(1). The New Jersey Courts correctly noted that the ADA "represented a significant change in Congress' regulation of the airline industry".

(Pet. App. A at 3a). The New Jersey Appellate Division cited to this Court's decision in Morales, supra, to explain the rationale behind that 1978 legislation:

> By adopting the ADA, Congress determined that "maximum reliance on competitive market forces" would best further 'efficiency, innovation, and low prices' as well as variety [and] quality . . . of air transportation services . . ." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378, 112 S. Ct. 2031, 2034, 119 L. Ed.2d 157, 164 (1992). The inclusion of § 1305(a)(1) within the ADA was a necessary part of that new approach:
>
> To ensure that the States would not undo Federal deregulation with regulation of their own, the ADA included a preemption provision, prohibiting the States from enforcing any law 'relating to rates, routes or services' of any air carrier.

(Pet. App. A at 3a-4a).

Petitioner's failure to cite to Morales is inexplicable since this Court's decision in Wolens is replete with references to that case. Moreover, the only other case cited by Petitioner in the body of her argument, i.e., not cited in a footnote, Continental Airlines, Inc. v. Kiefer, 920 S.W.2d 274 (Tex. 1996), specifically cites to Morales to set forth the scope of preemption intended by the ADA.

Although Petitioner does not set forth any specific holding in the Kiefer decision, it is relevant to note that Kiefer held that a suit based on a passenger being injured by a falling overhead bag did not fall within the preemptive scope of the ADA. 920 S.W.2d at 275-276. While the relevance of such a holding to the case at bar is somewhat unclear, it should be noted that the Kiefer decision clearly recognized that Morales prohibited the type of suit at issue herein.

The Kiefer decision correctly notes that the focus of Morales was on the scope of preemption intended by the ADA's express preemption provision. 49 U.S.C. App. 1305(a) now codified as 49 U.S.C. 41713(b)(1). That section prohibits the use of State law "relating to rates,

routes or service of any air carrier". 920 S.W.2d at 277. Kiefer specifically cites to Morales for its analysis as to the intended scope of the ADA's preemption provision. Id. at 278.

Kiefer cites to that portion of the Morales decision wherein this Court construes the meaning of the term "relating to":

> The phrase "relating to", the [Supreme] Court said, means to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," and thus "expressed a broad pre-emptive purpose." Id. at 383. The [Supreme] Court compared the provision to "the similarly worded pre-emption provision of the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a)". Id. at 383. Noting that it had, in several cases, already characterized identical language in the ERISA provision as having a "broad scope" and "expansive

> sweep", and as being "broadly worded", "deliberately expansive", and "conspicuous for its breadth", the [Supreme] Court concluded: "We think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are pre-empted" by the ADA. 504 U.S. at 384.

920 S.W.2d at 278-279.

Like the Kiefer decision, the underlying decision of the New Jersey Appellate Division cites to the exact same holding of this Court in Morales. (Pet. App. A at 4a). Although Petitioner omits any citation to Morales, reference to same is obviously a necessary prerequisite to determining any case which turns upon the intended scope of ADA preemption. By failing to consider Morales, Petitioner's argument distorts this Court's holding in Wolens.

Petitioner claims that Wolens would permit her case to go forward simply because it is characterized as a

common law cause of action. However, no holding in either Wolens or Morales supports such an argument. Indeed, both of those cases clearly preempt this type of claim because it has a significant regulatory impact on airline rates and attempts to use State law alter an airline's contract of carriage.

Although Petitioner claims the "ADA's savings clause" supports her argument (Pet. 10-11), she ignores that portion of the Kiefer decision which specifically cites to Morales as rejecting the argument that the savings clause in the prior statute limited the breadth of the ADA preemption provision. 920 S.W.2d at 279. In this regard, it is also relevant to note the general savings clause referred to was not part of the 1978 ADA legislation. Instead, that clause was enacted as part of the Federal Aviation Act of 1958. 49 U.S.C. § 40101, et seq. and 49 U.S.C. § 40120(c). The ADA was enacted 20 years later and did not contain any savings clause. Moreover, as the Kiefer court noted, even if that general "remedies" savings clause was applicable to the scope of ADA preemption, Morales held that it could not be interpreted to limit the intended scope of same. In this regard, Kiefer cited to the following holding in Morales:

The [Supreme] Court rejected the argument that the savings clause in the prior statute limited the breadth of the preemption provision. "A general remedies' savings clause cannot be allowed to supersede the specific substantive pre-emption provision . . ." Id. at 385. Underscoring the point, the [Supreme] Court added: "We do not believe Congress intended to undermine this carefully drawn statute through a general savings clause." Id. (quoting International Paper Co. v. Ouellette, 479 U.S. 481, 494, 93 L. Ed.2d 883, 107 S. Ct. 805 (1987).

The [Supreme] Court also rejected the arguments that the ADA "only preempts the States from actually prescribing rates, routes or services", id., and that "only state laws specifically addressed to the airline industry are pre-empted", 504 U.S. at 386. Such "loopholes" would allow

> "state impairment of the federal scheme" and ignore the broad "relating to" language of the provision. Id. The [Supreme] Court cited Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 95 L. Ed.2d 39, 107 S. Ct. 1549 (1987) which held that the preemption provision in ERISA, similar to the ADA's, extended to common-law tort and contract actions, 481 U.S. at 47-48.

920 S.W.2d at 279.

As noted by the Texas Supreme Court in Kiefer, Morales recognized that the preemptive scope of the ADA was not limited to laws specifically addressed to the airline industry. Id. Moreover, as Kiefer noted, this Court's direct analogy to the ERISA preemption provision in Morales and its citation to its prior decision in Pilot Life clearly establishes that the form of a party's cause of action, i.e., a common law contract or tort claim, cannot be cited as a basis for holding that a claim otherwise preempted should be allowed to proceed irrespective of the regulatory effect of

such a cause of action. Id. Such a conclusion is not warranted by any of the cited case law and certainly not warranted by any fair reading of this Court's subsequent decision in Wolens.

The Superior Court of New Jersey, Appellate Division, properly applied the preemption rule set forth by this Court in Wolens when it held that the Petitioner's claim was preempted by the ADA. The New Jersey Appellate Court correctly noted that the preemption rule set forth in Wolens "confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement. (Pet. App. A at 5a, citing Wolens 513 U.S. at 232-33) (emphasis supplied). That distinction is at the heart of the issue herein.

The Petitioner asserts that in Wolens, this Court held that the ADA does not preempt any common law contract claims. (Pet. 7). Such an argument is without merit. The holding in Wolens is not so broad. The real question, which the Petitioner does not even address, is whether Wolens preempts the particular contract claim

asserted herein. It surely is preempted, for precisely the reasons noted by the New Jersey Appellate Court.

As the New Jersey Appellate Court noted, Wolens draws an important distinction between the types of common law contract claims which are preempted and those which are not preempted. Petitioner ignores this crucial distinction because the common law contract claim at issue herein clearly falls within the type of claim which is preempted.

In Wolens, the plaintiff passengers brought suit challenging the defendant/airline's retroactive modification of its frequent-flyer program. 513 U.S. at 224-225. The plaintiffs alleged that the airline's retroactive modifications to their original contract devalued credits the plaintiffs had already earned and constituted a breach of their original contract. Id. The plaintiffs' suit in Wolens challenged the defendant/airlines's right to retroactively modify their original bargain. Id.

In Wolens, this Court held that the ADA preempted the plaintiffs' attempt to use the Illinois Consumer Fraud Act to enlarge or police the contract which they originally

entered into. 513 U.S.at 228. It stated that "Congress could hardly have intended to allow the States to hobble [competition for airline passengers] through the application of restrictive State laws." Id. However, this Court also held that the ADA preemption provision does not shelter airlines from claims alleging no violation of state imposed obligations, but "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." Id.

In analyzing whether a particular contract claim seeks recovery solely for the airline's alleged breach of its own, self-imposed undertakings, this Court held in Wolens that the ADA's preemption clause, read together with the FAA's savings clause, "stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." 513 U.S. at 232-233.

This Court found the foregoing distinction crucial in determining whether a contract claim is preempted. Accordingly, it held in Wolens that "[t]his distinction between what the State dictates and what the airline itself

undertakes confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." 513 U.S. at 233.

The foregoing distinction illuminates why one of the breach of contract claims in Wolens was not preempted and why the claim in the case at bar is preempted. Contrary to the non-preempted contract claim in Wolens, the contract at issue in the case at bar is clear in regard to the fee charged for a lost ticket. Indeed, even the Petitioner does not claim that the disputed term is ambiguous or susceptible to different interpretations. Thus, there is no issue as to whether Respondent "dishonored a term the airline itself stipulated to". Rather, the Petitioner's claim is an improper attempt to invalidate the parties' bargain by "enlarging or enhancing" the bargain though the use of "state laws or policies external to the agreement." As the New Jersey Courts recognized, such a contract claim is clearly preempted pursuant to Wolens.

CONCLUSION

There is no basis in law or fact to disturb the holding of the New Jersey State courts which have recognized that New Jersey law cannot be used to void one of the terms of an airline's contract of carriage and then penalize the airline for acting in accordance with same. Petitioner's lack of substantive authority to support a contrary result is not surprising since both Morales and Wolens clearly reject such a claim. Accordingly, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Class Action
Complaint, filed
November 14, 1996

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-C-12831-96

CLASS ACTION COMPLAINT
JURY TRIAL DEMANDED

LESLEY GAY BLACKNER, on behalf of herself and all others similarly situated

Plaintiff,

-against-

CONTINENTAL AIRLINES, INC.,

Defendant.

Plaintiff Lesley Gay Blackner, who resides at 52 East End Avenue, New York, New York 10028, by her attorneys, alleges as follows upon information and belief, except for the allegations pertaining to herself which are based upon personal knowledge:

NATURE OF THE ACTION

1. The litigation arises out of the practice of defendant Continental Airlines, Inc. ("Continental") of imposing illegal penalties to replace lost or forgotten airline tickets.

2. Continental incurs de minimis costs to issue replacement airline tickets. Yet, Continental imposes fees of up to 100 times its actual costs or more as a penalty to try to discourage passengers from losing or forgetting tickets. Such penalties, which are far in excess of any reasonable costs incurred when a customer misplaces a ticket, are not permitted under New Jersey or under the laws of any other state.

PARTIES

3. Plaintiff Lesley Gay Blackner is a Continental passenger who lost her Continental airline ticket and was assessed a $60.00 penalty fee for the issuance of a replacement ticket.

4. Defendant Continental is a Texas corporation headquartered at 2929 Allen Parkway, Houston, Texas 77019. Continental does business throughout the world, and maintains very substantial operations at Newark International Airport in Newark, New Jersey, one of Continental's hub locations.

SUBSTANTIVE ALLEGATIONS

5. On March 18, 1996,-plaintiff purchased a round trip air transportation ticket for $210.00 from Continental to travel on Continental flights between Jacksonville, Florida and Newark International Airport in Newark, New Jersey. Plaintiff flew on a Continental flight from Jacksonville to Newark on march 28, 1996.

6. Prior to her return flight from Newark, plaintiff discovered that she had lost her ticket.

7. When plaintiff arrived at the Continental terminal at Newark International Airport on April 7, 1996 for her return flight that day to Jacksonville, Florida, plaintiff explained to a Continental agent that she had lost her return airline ticket. The Continental agent responded that plaintiff would have to purchase a replacement ticket. The Continental agent further told plaintiff that she could apply for a lost ticket refund and that a $60.00 charge would

be deducted from her refund.

8. Confronted with the prospect of either paying the $60.00 lost ticket fee or not flying back to Jacksonville at all, plaintiff had no choice, and she was forced to purchase a replacement ticket from Continental for $105.00, which she paid for with a credit card. The Continental agent provided plaintiff with a lost ticket refund application.

9. Plaintiff completed and later submitted Continental's lost ticket refund application to Continental when she arrived at the Jacksonville, Florida airport. By letter dated August 23, 1996, Continental informed plaintiff that $45.00 would be credited to her credit card account within 30 to 45 days. The $105.00 amount plaintiff was compelled to pay for the replacement ticket, less the $45.00 refund, equals the $60.00 penalty imposed on plaintiff by Continental -- a penalty amounting to over 57% of the replacement ticket's price.

10. As reported in a May 5, 1996 article entitled "It's Your Money / Air-Ticket Loss Can Be Costly," published in the newspaper Newsday, Continental generally requires a person who reports a lost ticket for a domestic flight to pay the full fare for a replacement, without any

discounts that may apply to advance orders. If Continental determines that the original ticket has been used, the consumer gets no refund. If the original ticket is not used, the refund is issued for the purchase of the replacement ticket minus a $60.00 charge.

11. The cost of electronically issuing a replacement airline ticket is about 50 cents as reported by the Associated Press in a March 19, 1996 article headlined "Airline Group Urges Government To Be Flexible About Ticketless Travel." Such an electronic, computer-generated ticket would have sufficed to permit plaintiff to board her plane. Indeed, Continental now offers such electronic tickets to passengers on all of its domestic flights. Even if it were necessary to generate an actual paper replacement ticket, such a ticket does not cost more than $8.00 a piece to issue, as reported by the Associated Press in the March 19, 1996 article. Thus, the $60.00 charge for replacing a lost ticket is clearly a penalty imposed by Continental, unrelated to any reasonable cost it may actually incur by issuing a replacement ticket.

12. Bill Dreslin, a spokesperson for American Airlines, which also charges a $60.00 fee for replacing a lost airline ticket, actually admitted in the May 5, 1996 article

"It's Your Money / Air-Ticket Loss Can Be Costly" in Newsday that the $60.00 fee is "a penalty to try to discourage folks from losing tickets." Upon information and belief, Continental imposes the $60.00 fee for this reason, as well as to generate additional profits.

13. Plaintiff brings this action on her own behalf and as a class action pursuant to Rule 4:32 of the New Jersey Court Rules on behalf of all persons who were assessed an improper penalty fee of $60.00 by Continental for replacement of lost airline tickets (the "Class").

14. This action is properly maintainable as a class action for the following reasons:

(a) The class for whose benefit this action is brought is so numerous that joinder of all class members is impracticable. Thousands of airline tickets are reported lost each year. The members of the Class are geographically dispersed throughout New Jersey and the United States.

(b) There are questions of law and fact which are common to all members of the Class and which predominate over any questions affecting only individual members. The common questions include, inter alia, the following:

(i) whether the parties to the contract embodied by the Continental airline ticket, i.e. plaintiff and

the Class on the one hand and Continental on the other, intended to provide for an assessment of costs or damages rather than the imposition of a penalty;

(ii) whether the imposition of a $60.00 fee for replacing a lost ticket, far in excess of any reasonable cost actually incurred or damages suffered by Continental resulting therefrom, constitutes an unenforceable penalty pursuant to the contract law of New Jersey and the other states;

(iii) whether the costs or damages for which the penalty fee is meant to compensate Continental are difficult or impossible to calculate at the time the original ticket is purchased:

(iv) whether the penalty fee imposed by Continental for replacing a lost ticket is reasonably related to the cost actually incurred, or damages, if any, suffered by Continental in issuing a replacement ticket;

(v) whether the parties are of equal bargaining power; and

(vi) whether plaintiff and the members of the Class have suffered damages as a result of Continental's wrongful acts and the measure of such damages.

(c) Plaintiff's claims are typical of the claims

of the other members of the Class and plaintiff has no interests that are adverse or antagonistic to the interests of the Class.

(d) Plaintiff is committed to the vigorous prosection of this action and has retained competent counsel experienced in class action and consumer litigation of this nature. Plaintiff is an adequate representative of the Class and will fairly and appropriately protect the interests of the Class.

(e) The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the defendant.

FIRST CAUSE OF ACTION

(Breach Of Contract - Penalty)

15. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth herein.

16. Under the contract law of New Jersey and the other states, the imposition of a penalty in commercial transactions is prohibited.

17. The $60.00 fee imposed by Continental on passengers who lose their Continental airline tickets is a penalty because:

(a) the costs or damages for which the fee is meant to compensate Continental are not difficult or impossible to calculate at the time the original ticket is purchased. The cost of issuing an electronic replacement ticket is approximately 50 cents and the cost of issuing a paper replacement ticket is approximately $8.00;

(b) the $60.00 fee imposed by Continental for replacing a lost ticket is not reasonably related to the cost or damages actually incurred by defendant, i.e. 50 cents for issuing an electronic replacement ticket, or at most, $8.00 for issuing a paper replacement ticket; and

(c) the parties to the contract embodied by the original plane ticket, i.e. plaintiff and the class members on the one hand and Continental on the other, are not of equal bargaining power. Continental is a world-wide corporation with vast legal and financial resources, and the terms of the contract are drafted entirely by Continental.

18. Defendant's practices in imposing an improper penalty constitute a breach of contract and have injured plaintiff and the members of the Class. Accordingly,

plaintiff seeks damages, on behalf of herself and all others similarly situated, for reimbursement of the penalty fees wrongfully imposed by Continental due to the loss of airline tickets, plus interest, costs, and attorneys' fees.

SECOND CAUSE OF ACTION

(Unjust Enrichment)

19. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth herein.

20. As a proximate consequences of Continental charging improper $60.00 penalties for replacing lost airline tickets, Continental has been unjustly enriched in the amount of each such $60.00 sum charged to plaintiff and the members of the Class, less the amount of any actual costs reasonably incurred by defendant for replacing the lost tickets of plaintiff and the members of the Class.

THIRD CAUSE OF ACTION

(Breach Of Contract For Breach Of The Duty Of Good Faith And Fair Dealing)

21. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth herein.

22. Continental has an obligation to act towards plaintiff and the members of the Class in accordance with the

implied covenant and business relationships.

23. Continental has breached its duty of good faith and fair dealing to plaintiff and the members of the Class by imposing an illegal penalty for misplacing one's airplane ticket, thereby causing economic injury to plaintiff and the members of the Class. Such breaches are believed to be ongoing.

WHEREFORE, plaintiff demands judgment both individually and in favor of the Class and against defendant as follows:

A. Declaring this action to be properly maintainable as a class action pursuant to Rule 4:32 of the New Jersey Court Rules and certifying plaintiff as an appropriate class

B. Declaring that the $60.00 fee as alleged herein is an improper and unlawful penalty and that the imposition

of such fee constitutes a breach of the airline ticket contracts entered into by plaintiff and the members of the Class with Continental;

C. Awarding reimbursement of each $60.00 fee charged to each class member for replacing lost tickets, less any actual costs reasonably incurred or damages reasonably suffered by Continental as found at trial;

D. Enjoining Continental from assessing excessive and unreasonable lost ticket penalties grossly in excess of the reasonable actual costs to Continental of reissuing lost tickets;

E. Awarding to plaintiff and the members of the Class interest, costs, and reasonable attorneys' and expert fees; and

F. Awarding such other and further relief as may be just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: Newark, New Jersey
November 14, 1996

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